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IN THE
COURT OF APPEALS OF INDIANA

TOWN OF LaFONTAINE, INDIANA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 85A04-0602-CV-97
	)	
BOOKWRIGHT & CO. and	)	
GMAC COMMERCIAL MORTGAGE,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE WABASH CIRCUIT COURT
The Honorable Robert R. McCallen III, Judge
Cause No. 85C01-0509-PL-504

August 21, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-plaintiff Town of LaFontaine, Indiana (Town), appeals from the trial court's order setting aside a default judgment against appellee-defendant Bookwright & Co. ("Bookwright") and vacating its dismissal of appellee-defendant GMAC Commercial Mortgage (GMAC). In particular, the Town argues that the trial court erred in setting aside its dismissal of GMAC and its order granting a default judgment against "Bookwright".

Finding that the trial court properly set aside its dismissal of GMAC because no motion to dismiss was ever filed and that the trial court properly set aside the default judgment because the proper party was never served, we affirm the judgment of the trial court and remand with instructions to enter an order directing the Town to amend its complaint to name Brookwright & Company (Brookwright), rather than "Bookwright," as a defendant and to serve its complaint on Brookwright.

FACTS

This case revolves around a Sewage Revenue Bond (Bond) that was issued on November 3, 1967. Pursuant to the Bond, the Town agreed to pay to the registered holder of the Bond the principal sum of $266,000 plus interest from the date of the Bond at the annual rate of 4 1/2%. Although the merits of the dispute surrounding the Bond are not at issue in this appeal, we note briefly that the Town argues that, pursuant to a waiver, interest did not begin to accrue on the principal until January 1, 1971. GMAC, on the other hand, contends that although payment of the interest was deferred until January 1, 1971, it was not waived.

The Bond was originally issued to the United States of America, acting through the administrator of the Farmers Home Administration. On January 31, 1990, the Bond was

assigned to Shawmut Bank, N.A., as trustee on behalf of the Community Program Loan Trust. Eventually, the Bond was assigned to Brookwright. In September 1990, the Town received notice that the Bond had been assigned to Brookwright.

On September 11, 1990, a notice was sent to Linda Harris, the Clerk Treasurer of the Town, showing that the Bond was to be registered in the name of Brookwright, c/o General Electric Credit Corporation (GE). On October 16, 1990, the Bond was again assigned—following the instructions of the Town's attorney—to Brookwright. On October 23, 1990, Harris registered the Bond on the books of the Town in the name of "Bookwright" c/o GE, rather than Brookwright. There is no evidence that any entity named "Bookwright" exists.

Effective November 15, 1997, the servicing of the Bond was transferred from GE to GMAC. GMAC has been collecting the required payments from the Town since that date.

On September 26, 2005, the Town filed a declaratory judgment action against "Bookwright" and GMAC, requesting a judgment regarding the parties' differing interpretations of the Bond. The Town did not name Brookwright as a defendant.

The Town attempted, on several occasions, to serve a copy of the complaint on "Bookwright". On October 3, 17, and 21, 2005, the Town received notice that "Bookwright" had not been served. On November 8, 2005, the Town filed a praecipe for issuance of summons. On November 14 and December 14, 2005, the Town received notice from CT Corporation, GMAC's registered agent, that "Bookwright" was not listed in the records of CT Corporation.[1]

[1] We acknowledge that the record contains a summons that was returned as served on Bookwright Corporation c/o GMAC Commercial Mortgage on September 26, 2005. Appellant's App. p. 32. But

On November 28, 2005, GMAC filed its answer to the complaint, including an affirmative defense arguing that the Town's complaint failed to state a claim against GMAC upon which relief could be granted. On December 19, 2005, the Town filed an "Answer to GMAC's Rule 12 Motion to Dismiss," ostensibly based upon GMAC's first affirmative defense. Appellant's App. p. 71. On that same day, the trial court entered an order dismissing GMAC. GMAC has never filed a motion to dismiss.

On December 15, 2005—one day after the Town received its final notice that "Bookwright" had not been served—the town filed a motion for default judgment against "Bookwright," representing to the trial court that the complaint and summons had been served on "Bookwright" on September 29, 2005. On the same day that the Town filed its motion, the trial court granted it, entering a default judgment against "Bookwright" and an order—drafted pursuant to the Town's suggestion—stating that the Bond was to be considered fully paid as of the $15,058.00 payment to be made on January 1, 2007. According to that order, the Town owes no interest on the bond for the time between its issuance and January 1, 1971. GMAC's attorney did not receive a copy of the Town's motion until late in the day on Friday, December 16, 2005, and did not receive a copy of the trial court's judgment until Monday, December 19, 2005—the day on which the Town filed its "Answer to GMAC's Rule 12 Motion to Dismiss." Appellant's App. p. 71-72.

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inasmuch as the Town continued to attempt to serve Bookwright following September 29, we can only conclude that the Town surmised, as a result of its communications with CT Corporation and its receipt of a number of notices that Bookwright had not been served, that Bookwright had not, in fact, been served on September 26. And indeed, inasmuch as Bookwright does not exist, it is not possible that it was served with the Town's complaint.

On December 30, 2005, GMAC filed a motion to set aside the default judgment against "Bookwright". On January 20, 2006, following a hearing, the trial court set aside the default judgment against "Bookwright" and the dismissal of GMAC, noting that this outcome would allow the issues in the litigation to be resolved on the merits. The Town now appeals.

DISCUSSION AND DECISION

I. Dismissal of GMAC

The Town first argues that the trial court erred in setting aside its dismissal of GMAC. Indiana Trial Rule 41(F) provides that a trial court may set aside the dismissal of a party with prejudice "for the grounds and in accordance with the provisions of Rule 60(B)." Rule 60(B), in turn, sets forth a number of grounds upon which a trial court may provide a party relief from judgment. Although none of the specific grounds enumerated by the rule apply to this situation, there is a catch-all provision enabling the trial court to set aside the dismissal for "any reason justifying relief from the operation of the judgment . . . ." Ind. Trial Rule 60(B)(8).[2]

Whether to grant a motion for relief from judgment pursuant to Trial Rule 60(B) is within the equitable discretion of the trial court. In re Adoption of T.L.W., 835 N.E.2d 598, 600 (Ind. Ct. App. 2005). We will affirm absent a finding that the trial court abused its discretion, which occurs when its decision is clearly against the logic and inferences before it. Id.

[2] A party seeking relief pursuant to Rule 60(B)(8) must establish a meritorious claim or defense. Here, there is no suggestion that GMAC has not established a meritorious claim or defense, and we will proceed under the assumption that it has satisfied that portion of the rule. Similarly, there is no allegation that GMAC filed its motion to set aside the dismissal in an untimely manner.

Here, GMAC has never filed a motion to dismiss. Its answer includes a first affirmative defense arguing that the Town fails to state a claim against GMAC upon which relief may be granted, but the mere fact that its affirmative defense contains language from Trial Rule 12(B)(6) does not magically transform the affirmative defense into a motion to dismiss. It is apparent to us that this situation, albeit quite unusual, certainly justifies relief from operation of the judgment.

The Town argues that GMAC is not the real party in interest, inasmuch as it is not the entity to whom the Bond is issued. Thus, the Town concludes, GMAC does not have standing to contest its dismissal. Having sued GMAC, however, the Town may not now argue that GMAC is without any rights to defend itself in this action. Such a proposition is untenable. If GMAC desire to remain a defendant in this lawsuit and litigate the Town's claims on the merits, it is well within its rights to do so as a named party defendant.[3] We conclude, therefore, that the trial court properly set aside the dismissal of GMAC.

II. Default Judgment

The Town next argues that the trial court erred in setting aside the default judgment entered against "Bookwright". As with motions to dismiss, the trial court may relieve a party from a default judgment upon any of the grounds contained in Rule 60(B). Ind. Trial Rule 55(C).

Our review of a trial court's order setting aside a default judgment is limited to determining whether there has been an abuse of discretion. Charnas v. Estate of Loizos, 822

[3] We will address GMAC's standing to contest the default judgment of Bookwright later in this opinion.

N.E.2d 181, 184 (Ind. Ct. App. 2005). Thus, on appeal, the burden is on the appellant to demonstrate that the trial court's decision was clearly against the logic and effect of the facts and circumstances before it or that the trial court misinterpreted the law. Id. at 184-85.

We also emphasize that although default judgments play an important role in the maintenance of an orderly, efficient judicial system as a weapon for enforcing compliance with the rules of procedure and for facilitating the speedy determination of litigation, in Indiana there is a marked judicial deference for deciding disputes on their merits and for giving parties their day in court, especially in cases involving material issues of fact, substantial amounts of money, or weighty policy determinations. Id. at 185.

Because of the scrivener's error made by the Town's Clerk Treasurer, the Town sued the wrong entity—"Bookwright" instead of Brookwright. Consequently, Brookwright was never served with the Town's complaint. Thus, Brookwright was "without actual knowledge of the action," and the trial court properly set aside the default judgment. T.R. 60(B)(4). That being said, the only way that this litigation can be fully and fairly resolved on the merits is if the Town amends its complaint to include Brookwright, instead of "Bookwright," as a defendant and then serves its complaint on Brookwright.

As to whether GMAC had standing to move to set aside the default judgment against "Bookwright," we note that generally, a co-defendant has an interest in ensuring that all other proper co-defendants remain in the lawsuit so that the litigation can be fully and fairly resolved. More specifically, here, if a default judgment against its co-defendant—whether called "Bookwright" or Brookwright—stands, GMAC is at risk of sustaining damage.

GMAC is the current servicing agent for the Bond. Specifically, GMAC has a contract to collect the amounts due under the Bond. Thus, if GMAC collects less than what was originally believed to be the amount owed under the Bond, then both GMAC and the holder of the Bond will have been harmed. Thus, it is apparent to us that because GMAC is directly involved with the servicing of the Bond and because it is a named defendant, it had standing to protest the default judgment and has standing on appeal. Given the peculiar circumstances surrounding this case and given our preference for resolving disputes on their merits, we conclude that the trial court properly set aside the default judgment.

The judgment of the trial court is affirmed and remanded with instructions to enter an order directing the Town to amend its complaint to name Brookwright, rather than "Bookwright," as a defendant and to serve its complaint on Brookwright.

VAIDIK, J., and CRONE, J., concur.